

Office of the Attorney General
State of North Dakota

Opinion No. 82-80

Date Issued: December 30, 1982
Requested by; Owen K. Mehrer
Stark County State's Attorney

--QUESTIONS PRESENTED--

I.

Whether a register of deeds may refuse to file common law liens against real property.

II.

Whether a register of deeds may refuse to file a lis pendens that does not meet the requirements of Section 28-05-07 of the North Dakota Century Code.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a register of deeds may refuse to file common law liens against real property.

II.

It is my further opinion that a register of deeds may refuse to file lis pendens that does not meet the requirements of Section 28-05-07, N.D.C.C.

--ANALYSIS--

I.

The right to record a document in the office of the register of deeds is entirely a statutory right and is not based on any principle of common law. 66 Am.Jur.2d, Records and Recording Laws, § 47 (1982). In North Dakota, the only statute that could arguably authorize the filing of a common law lien against real property is Section 47-19-01, N.D.C.C., which states:

47-19-01. INSTRUMENTS ENTITLED TO RECORD.--Any instrument affecting the title to or possession of real property may be recorded as provided in this chapter.

Thus, an instrument can only be recorded if it affects the title to or possession of real property.

Common law liens apply only to personal property in the possession of the lien holder, 51 Am.Jur.2d, Liens, § 20 (1982). They do not affect real property and therefore they cannot be filed under the authority of Section 47-19-01, N.D.C.C. Furthermore, it is questionable whether common law liens are even recognized in North Dakota. Section 1-01-06, N.D.C.C., provides that 'there is no common law in any case where the law is declared by the code.' Title 35, N.D.C.C., sets forth a comprehensive body of statutory liens which preempt all liens at common law. See *United States v. Hart*, 545 F. Supp. 470 (N.D. 1982).

There are other statutes that authorize the filing of specific liens against real property. For example, Chapter 35-27, N.D.C.C., provides for the filing of a mechanic's lien against real property.

Although denominated as 'common law liens', the instruments involved in the questions presented are more in the nature of prejudgment attachments because they state that the property described 'will be subject to prosecution to satisfy judgments in this action.' Chapter 32-08.1, N.D.C.C., sets out the procedure for obtaining a writ of attachment. The documents sought to be filed do not meet any of the requirements for filing an attachment against real property, therefore they are not entitled to be filed.

II.

Section 28-05-07, N.D.C.C., sets forth the prerequisite to the filing of lis pendens. First, lis pendens may only be filed in a civil action affecting the title to real property. Second, lis pendens may only be filed at the time of filing the complaint or any time thereafter. Third, the lis pendens must contain the names of the parties, the object of the action, and the description of the real property affected. There is no right to file lis pendens apart from this statute. Any lis pendens presented for filing that does not conform to the requirements of Section 28-05-07, N.D.C.C., is not entitled to be filed.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Attorney General

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